

APPEAL NO. 031842
FILED AUGUST 25, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 4, 2003, with the record closing on June 16, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant (claimant) sustained a compensable injury on _____; that the claimant had disability from January 29 through May 28, 2003; that the appellant/cross-respondent (carrier) is not relieved of liability under Section 406.032(1)(A) because the claimant was not in a state of intoxication as defined by Section 401.013; and that the carrier waived the right to contest compensability of the claimed injury by failing to contest the claimed injury in accordance with Section 409.021. The carrier appeals the hearing officer's determinations that the claimant sustained a compensable injury on _____; that he had disability from January 29 through May 28, 2003; that it is not relieved of liability because the claimant was not in a state of intoxication; and that it waived its right to contest the compensability of the claimed injury under Section 409.021. The claimant appeals the hearing officer's findings of fact for omitting a finding that the claimant's neck and back injuries are compensable due to the carrier's waiver, and appeals the hearing officer's determination that disability ended on May 28, 2003. Each party filed a response.

DECISION

We affirm in part, reverse and render in part, and reverse and remand in part.

The carrier asserts in its response that the claimant's request for appeal was not timely filed. Section 410.202(a) states: "To appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provides that a request for appeal shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision; and (2) received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be complied with for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 020172, decided March 12, 2002. Rule 102.5(d) provides in pertinent part that unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed.

Records of the Commission reflect that the hearing officer's decision was mailed to the claimant on June 25, 2003. Pursuant to Rule 102.5(d), the claimant is deemed to have received the hearing officer's decision on June 30, 2003. The 15th day after the deemed date of receipt of June 30, 2003, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, was July 22, 2003, and the 20th day was July 29, 2003. The envelope in which the claimant's request for appeal was mailed to the Commission reflects that the request for appeal was mailed on July 21, 2003. The Commission received the claimant's request for appeal on July 25, 2003. The claimant's request for appeal was timely filed with the Commission. The carrier's request for appeal was also timely filed with the Commission, as it received the hearing officer's decision on June 25, 2003, and the Commission received its request for appeal on July 14, 2003, which was within the 15-day time period for filing an appeal, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code.

CARRIER'S APPEAL

With regard to the waiver issue, in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." In Appeal No. 030380-s, the Appeals Panel held that "to comply with the Supreme Court's holding in Downs, the carrier has the burden to prove that it 'took some action within seven days,' and to present evidence indicating the action taken."

In the instant case, the carrier appeals the hearing officer's finding that the February 5, 2003, facsimile transmission (fax) from the claimant's attorney to the carrier constituted written notice of injury. It is not disputed that the carrier received the fax on February 5, 2003, or that on February 25, 2003, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Commission in which it disputed compensability on the bases of no injury in the course and scope of employment and intoxication. It is also undisputed that the carrier did not take any action within seven days of February 5, 2003, indicating that it had accepted the claim or intended to pay benefits.

The carrier contends that the February 5, 2003, fax does not meet the requirements for written notice of injury under Rule 124.1(a)(3) which provides:

- (3) if no Employer's First Report of Injury has been filed, any other communication regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer,

the approximate date of the injury and information which asserts the injury is work related.

The February 5, 2003, fax, with attachments, informed the carrier of the name of the claimant, the identity of the employer, the date of the injury, and that the claimant's attorney was representing the claimant "regarding the above-referenced workers' compensation injury." The carrier contends that the fax did not provide the carrier with "information which asserts the injury is work related," and is therefore defective as written notice of injury. The carrier cites Texas Workers' Compensation Commission Appeal No. 971341, decided August 28, 1997, in support of its assertion. Appeal No. 971341 determined that a benefit review conference (BRC) notice did not constitute written notice of injury under prior Rule 124.1(a)(3) because it did not include "facts showing compensability."

However, on August 29, 1999, a new Rule 124.1 became effective, which excluded the requirement that the written notice under Rule 124.1(a)(3) include "facts showing compensability" and replaced that requirement with the requirement that the notice have "information which asserts the injury is work related." The preamble to new Rule 124.1(a)(3), which includes the amended language, states "the new rule requires only the assertion that the injury was work related." 24 Tex. Reg. 6503 (1999). In Texas Workers' Compensation Commission Appeal No. 021558, decided August 7, 2002, the Appeals Panel considered the requirement under new Rule 124.1(a)(3) that the notice give "information which asserts the injury is work related," and stated "we consider a BRC Set Notice sent out from the Commission as adequate notice to a carrier that a work-related injury has been alleged." In the instant case, the fax of February 5, 2003, does assert that the injury is work related, and contains the rest of the required information. Accordingly, we conclude that the hearing officer did not err in finding that the February 5, 2003, fax from the claimant's attorney to the carrier constituted written notice of injury, and in concluding that the carrier waived its right to contest compensability of the claimed injury by failing to contest the injury in accordance with Section 409.021.

With regard to the intoxication issue, since the carrier waived its right to contest compensability of the injury, the carrier lost its right to assert an intoxication defense under Section 406.032(1)(A). Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003.

The carrier asserts that the hearing officer's finding of fact that on _____, the claimant sustained an injury to his knee when he slipped on a substance on the floor, and the hearing officer's conclusion of law that the claimant sustained a compensable injury on _____, are contrary to the evidence. Since the carrier waived its right to dispute compensability of the injury, the claimant's right knee injury became compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 022661, decided November 19, 2002. In addition, even if the carrier had not waived its right to contest compensability, the challenged finding of fact

and conclusion of law are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The carrier also contends that the hearing officer erred in finding and concluding that the claimant had disability from January 29 through May 28, 2003, asserting that the claimant did not sustain a compensable injury, that the claimant suffers from preexisting conditions, and that the claimant was fired for refusing to submit to a drug test. Conflicting evidence was presented on the disability issue. Section 401.011(16) defines disability as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer’s determination that the claimant had disability from January 29 through May 28, 2003, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

CLAIMANT’S APPEAL

The claimant contends that the hearing officer erred in not finding that the claimant’s back and neck injuries are compensable due to the carrier’s waiver of its right to contest compensability. We agree with the claimant’s contention.

There was no disputed issue from the BRC regarding the extent of the compensable injury; however, the parties did litigate what injuries were sustained in the alleged work-related accident of _____. In her decision, the hearing officer wrote that there is little to establish that the claimant suffered an aggravation of his neck and low back in the fall at work in (month) (year). The hearing officer made a finding of fact that on _____, the claimant sustained an injury to his knee when he slipped on a substance on the floor. The hearing officer did not make a finding of fact as to whether the claimant sustained an injury to his neck and low back when he fell at work.

It is clear from the evidence that from the very outset of the injury, the claimant was claiming that he injured his right knee, neck, and lower back when he fell at work on the date of injury. The doctor who saw the claimant on the date of injury after the claimant fell noted that the claimant was complaining of his right knee, neck, and back due to the fall at work, and by February 5 and 6, 2003, the claimant had undergone MRIs of his lumbar spine and cervical spine, which were reported to show disc bulges. The claimant’s Employee’s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated February 19, 2003, noted that the body parts affected are his right knee, low back, and neck. The carrier’s TWCC-21 that was filed on February 25, 2003, noted the nature of the injury as “Alleged knee, low back & neck.” The claimant’s treating doctor has diagnosed the claimant as having injuries to his right knee, lumbar area, and cervical area.

In Texas Workers' Compensation Commission Appeal No. 030831, decided May 22, 2003, the Appeals Panel noted that Rule 124.3(c) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes, but that the Appeals Panel has said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. It is clear in the instant case that the primary claimed injury was to the right knee, lower back, and neck. Since the carrier waived the right to contest compensability of the injury, the claimant's primary claimed injury to his right knee, lower back, and neck became compensable as a matter of law, and it was error for the hearing officer to limit the claimant's compensable injury to his right knee. Appeal No. 030831; Texas Workers' Compensation Commission Appeal No. 023101, decided January 30, 2003; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002.

It is clear from the hearing officer's decision that she based her finding of disability for the period of January 29 to May 28, 2003, on the claimant's compensable right knee injury only, and did not consider whether disability would extend beyond May 28, 2003, based on the claimant's injuries to his lower back and neck, which are compensable due to the carrier's waiver of the right to contest compensability. Consequently, we must remand the disability issue to the hearing officer for her to make a determination as to whether the claimant had disability after May 28, 2003, based on the entire compensable injury, including the right knee, lower back, and neck. See Appeal No. 022661, *supra*.

We affirm the hearing officer's determinations that the claimant sustained a compensable injury on _____; that the claimant had disability from January 29 through May 28, 2003; that the carrier is not relieved of liability because the claimant was not in a state of intoxication; and that the carrier waived the right to contest compensability of the claimed injury by failing to contest the injury in accordance with Section 409.021. We reverse the hearing officer's determination that limits the claimant's compensable injury to a right knee injury only, and we render a decision that the claimant's compensable injury includes his right knee, lower back, and neck due to the carrier's waiver of the right to contest compensability. We reverse the hearing officer's determination that ends the claimant's period of disability on May 28, 2003, and we remand the disability issue to the hearing officer for the hearing officer to make a determination as to whether the claimant had disability after May 28, 2003, based on the compensable injury to the claimant's right knee, lower back, and neck.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge